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No. 76-1494

In the Supreme Court of the United States

OCTOBER TERM, 1976

FAY ANDERSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek damages against the government under the Federal Tort Claims Act (28 U.S.C. 1346(b)) on the ground that several agents of the Internal Revenue Service negligently designed and implemented a government program to investigate certain commercial tax return preparers. The courts below held that petitioners' suit was barred by the statutory exceptions to the Federal Tort Claims Act set forth in 28 U.S.C. 2680(a) and (h), relating to discretionary functions and to claims of slander and malicious prosecution.

The pertinent facts are as follows: Petitioner Fay Anderson was in the business of preparing tax returns. Pursuant to an investigation of tax return preparers, two Internal Revenue Service agents engaged petitioner to prepare tax returns on the basis of data they supplied to

him. Some time later, another Internal Revenue Service agent visited petitioner's offices and, after informing him of his rights, asked to examine his files. Petitioner consented to these examinations and further agreed to let the agent take certain of the files back to his office (Pet. App. A, pp. A. 1-A. 2).

On the basis of information derived from these files and from interviews with certain of Anderson's clients, an agent of the Internal Revenue Service filed a complaint against him before a United States magistrate, charging him with aiding and assisting in the preparation and presentation of false and fraudulent income tax returns, in violation of 26 U.S.C. 7206(2). Pursuant to an arrest warrant the magistrate issued, the agent arrested petitioner and immediately took him before a magistrate, who set a date for a preliminary hearing and ordered him released on his own recognizance. After the preliminary hearing, the magistrate dismissed the charges against Anderson (Pet. App. A, p. A. 2).

Thereafter, Anderson filed suit in the United States District Court for the District of Iowa against the Internal Revenue Service agents involved in the investigation, seeking damages from the agents personally for the allegedly unlawful searches and arrest. The district court dismissed petitioner's suit on the ground that the agents were immune from suit, under both an absolute or a qualified immunity standard, on the ground that they had acted in good faith within the scope of their authorized duties (*Anderson* v. *Lindsay*, 33 A.F.T.R. 2d 1001; *Anderson* v. *Langenwalter*, 33 A.F.T.R. 2d 1099). The court of appeals affirmed (508 F. 2d 846), and this Court denied certiorari (421 U.S. 962).

Anderson then joined with the other petitioners to bring the present action against the United States under

the Federal Tort Claims Act. The complaint alleged that negligence by governmental officials in "formulating the objectives" of the investigatory program and in devising "plans for its implementation" (Pet. App. B, p. A. 9) had resulted in unlawful searches of Anderson's offices, his unlawful arrest and other illegal invasions of petitioners' rights. The district court held that the suit was barred by 28 U.S.C. 2680(a) and (h), which prohibits suits under the Federal Tort Claims Act for recovery of damages resulting from the exercise of "discretionary functions" and from false arrest, libel and slander (Pet. App. B, pp. A. 6-A. 10).[1] The court of appeals affirmed *per curiam* (Pet. App. A, pp. A. 1-A. 5).

The courts below correctly held that petitioners could not relitigate their prior suit against the Internal Revenue agents by suing the government under the Federal Tort Claims Act. The Secretary of Treasury or his delegate, the Commissioner of Internal Revenue, has ample authority to investigate those who prepare tax returns. *United States* v. *Carter*, 489 F. 2d 413 (C.A. 5); *United States* v. *Turner*, 480 F. 2d 272 (C.A. 7); *United States* v. *Theodore*, 479 F. 2d 749 (C.A. 4); 26 U.S.C. 6201, 6212, 6402, 7206(1) and (2).

The particular fashion in which he discharges this statutory responsibility necessarily involves substantial discretion. Here, petitioners' complaint is that Treasury officials acted "negligently" when they established the

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[1]Petitioners filed an identical suit in the United States District Court for the District of Columbia. The district court likewise dismissed the action as barred by 28 U.S.C. 2680(a) and (h) and, in addition, for improper venue (28 U.S.C. 1402(b)) (Pet. App. D, p. A. 12). The court of appeals affirmed *per curiam* (Pet. App. C, p. A. 11).

guidelines and issued the directives for a program to investigate various commercial tax return preparers. But those actions were policy level discretionary acts. Suit based upon them is barred by 28 U.S.C. 2680(a), which prohibits suit under the Federal Tort Claims Act for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty * * * whether or not the discretion involved be abused." *Dalehite* v. *United States*, 346 U.S. 15. This "discretionary function or duty" exception to the Tort Claims Act extends not only to "determinations made by executives or administrators in establishing plans, specifications or schedules of operations," but also to the "acts of subordinates in carrying out the operations of government in accordance with official directions." *Dalehite* v. *United States*, 346 U.S. at 35-36.[2]

Moreover, the courts below correctly held (Pet. App. A, p. A. 5; Pet. App. B, p. A. 10) that petitioners' claims seeking recovery for damages allegedly resulting from Anderson's arrest and the attendant publicity are also barred by 28 U.S.C. 2680(h),[3] which precludes suits presenting claims "arising out of * * * false imprisonment, false arrest,

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[2]As the court of appeals noted (Pet. App. A, p. A. 4), petitioners did not set forth in their complaint their claim (Pet. 14-15) that the Internal Revenue Service agents did not follow the guidelines issued by their agency. At all events, this claim is substantially undercut by the decision in the prior suit that the agents acted in good faith and within the scope of their authority.

[3]Congress amended 28 U.S.C. 2680(h) in 1974, Act of March 16, 1974, Section 2, 88 Stat. 50, to provide that recovery might be had under the Federal Tort Claims Act for "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" claims resulting from the "acts or omissions of investigative or law enforcement officers." But that amendment is, by its own terms, inapplicable to events, as in this case, that occurred prior to its enactment.

malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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[4]Although the courts below found it unnecessary to address the question (Pet. App. B, p. A. 8), petitioners' suit is also barred by 28 U.S.C. 2680(c), which bars tort claims involving "any claim arising in respect of the assessment or collection of any tax * * *." *United States* v. *Worley*, 213 F. 2d 509 (C.A. 6); *Broadway Open Air Theatre* v. *United States*, 208 F. 2d 257 (C.A. 4).

DOJ-1977-06